In the Court of Common Pleas of Philadelphia.

IN THE MATTER OF THE PETITION OF WILLIAM C. STEVENSON, CONTESTING THE ELECTION OF ALBERT LAWRENCE, AS CLERK OF THE ORPHANS' COURT.

A statute directing a Court to hear and determine a case "at the next term," does not prohibit such Court from proceeding to determine it after the expiration of the term, if the words of the statute are affirmative only. Such a statute is merely directory, and negative words are necessary to oust the jurisdiction of the Court when it has once attached.

This was a case of contested election for the office of Clerk of the Orphans' Court of the County of Philadelphia, and arose under an Act of July 2d 1839, sect. 5, relating to the election of prothonotaries and clerks, which provided as follows:

"The returns of the elections, under this Act, shall be subject to the inquiry, determination, and judgment of the Court of Common Pleas of the proper county, upon complaint in writing of thirty or more of the qualified electors of the proper county of undue election or return of any such officer, two of whom shall take and subscribe an oath or affirmation, that the facts set forth in such complaint are true, to the best of their knowledge and belief; and the said court shall, in judging concerning such election, proceed upon the merits thereof, and shall determine, finally, concerning the same, according to the laws of this commonwealth; and the prothonotary of the said court shall, immediately, certify to the governor, the decree of the said court on such election, and in whose favor such contested election shall be terminated, and the governor shall then issue the commission to such person in whose favor such contested election has determined; and the said court shall hear and determine such contested election, at the next term after the election shall have been held, and such complaint shall not be valid or regarded by the court, unless the same shall have been filed in the prothonotary's office within ten days after the election; and, in case such complaint is filed within the time above mentioned, it shall be the duty of the prothonotary to transmit by mail, imme-

diately, to the governor, a certified copy thereof, and in such case, no commission shall be issued until the court shall have determined and adjudged on such complaint as aforesaid."

The petition was filed November 22d 1861, and the next term of the Court commenced on the first Monday of December following, and expired on the 2d of March 1862. The cause had been on trial for a considerable time, and it was impossible, owing to the great number of witnesses, and the intricate nature of the case, to finish it before March 2d 1862, when the December term expired. On March 5th 1862, motions were made on behalf of the respondent: 1st. That the case be no further proceeded with. 2d. That the complaint be dismissed, on the ground that the time prescribed by the statute for hearing and disposing of the same has elapsed.

These motions were argued the same day by counsel, and an oral opinion given by THOMPSON, P. J., that the Court was bound to go on, and "finally decide" the case, and that the motions be refused. LUDLOW, J., was of opinion that the power of the Court over the case had ceased by limitation of law, and that the petition should be dismissed. A further difference of opinion arose as to what entry should be made on the record, where the Court was equally divided in opinion upon a question of jurisdiction. Subsequently, the whole matter was re-argued before a full bench.

L. C. Cassidy and *W. L. Hirst*, for respondent.—The Act directing the cause to be determined at the next term must be held to be imperative, and to prohibit any decision of the case after the expiration of that term. The legislature has said the complaint shall be filed within a certain time, and the case shall be finished within a certain time. After the expiration of the term, the power of the Court over the case ceases, and the complainants are out of court. *Carpenter's Case*, 2 Harris 486; *Bingham* vs. *Cabot*, 3 Dallas 19. The law requires that the case "shall be heard and determined at the next term," and this is equivalent to saying that it shall not be heard *after* the next term. Where the judges divide on a question of jurisdiction, the case cannot go on.

G. M. Conarroe and *F. Carroll Brewster*, for complainants.—The Act of Assembly is merely directory as to the time in which the case shall be decided. The Court is not prohibited from hearing the cause after the term, if it has been commenced in proper time. No negative words are used, and such words are necessary to make a statute prohibitory in such a case as this. A statute directing a public officer to do a certain thing within a certain time is directory only, unless he is restrained from doing it after that time: *Rex* vs. *Sparrow*, 2 Str. 1123; *Rex* vs. *Loxdale*, 1 Burr. 447; *Pond* vs. *Negus*, 3 Mass. 230; *People* vs. *Allen*, 6 Wend. 486; *People* vs. *Cook*, 14 Barb. 290; *Walker* vs. *Chapman*, 22 Ala. 126; *Ryan* vs. *Valandigham*, 7 Ind. 416; *Rex* vs. *Justices of Leicester*, 7 B. & C. 13. The petition must be filed within a certain time, because the legislature has said that if not so filed it shall "not be valid or regarded by the Court." No such words are used in reference to the time in which the case shall be decided. It is simply to be determined "at the next term." The Court is asked to insert by implication the words "and not after." This cannot be done. The legislature only meant the case to be heard and decided with all convenient speed. They did not expect the Court to perform physical impossibilities: *Covanhovan* vs. *Hart*, 9 Harris 502. Under the certiorari law (Purd. 316), cases are required to be decided "at the term to which they are returnable," yet it is not an uncommon practice for the Court to decide them after the term. The jurisdiction is *exclusive*, and the case must be decided by this Court or not at all: *Carpenter's Case*, 2 Harris 486. The jurisdiction of the Court having attached, it cannot be divested by delay in rendering judgment. The construction put upon the Act by the respondent, would lead to the most absurd results, viz.: that the case can never be decided; that the Governor can issue no commission; and that a large body of voters are to be disfranchised. The Court having been divided upon the motion it falls, and the proper entry on the record should be "motion overruled."

The opinion of the Court was delivered by

ALLISON, J.—When the case was last before the Court it was

upon a motion to dismiss the petition of the contestant and that the Court do not proceed further with the cause. Upon this motion the Court, as then constituted, divided in opinion, my brother LUDLOW being in favor of the motion, and my brother THOMPSON against it; the former holding that the jurisdiction of the Court over the case was at an end, expressing his willingness to hear the evidence in the cause, and the latter being of the opinion that it was not out of Court, but before them for decision and final determination.

Upon this state of facts the Court being unable to proceed, on the invitation of my brethren I have come into this cause upon the question as formally stated to me, "what entry should be made upon the record, where the Court is equally divided in opinion on a question of jurisdiction?" The precise point raised by this question was, however, abandoned practically by the counsel on both sides, and the question considered by them, and to which the attention of the Court was mainly directed, was, what is the true and proper construction of the fifth section of the act of July 2d, 1839, providing for the election of prothonotaries, &c., under which law the petition of William C. Stevenson was filed in this Court.

The difficulty which has arisen in the cause, is as to the true intent and meaning of the clause of the said section, which says, "and the Court shall hear and determine such contested election at the next term after the election shall have been held." This, it is contended, is imperative upon the Court, and that if the election contested shall not have been determined before the expiration of the next term, the case drops for want of further jurisdiction.

In the construction of statutes affirmative words enjoining the performance of an act by a public officer, are generally regarded as directory only; negative words will make a statute imperative, and it is apprehended affirmative may, if they are absolute, explicit, peremptory, and show that no discretion is intended to be given. Dwarris on Statutes 715. If to the clause under consideration, the words *and not after* had been added, we would have a perfect illustration of the principle stated; these words of negation would convert that which in its ordinary signification is but directory into a com-

mand; taking from the Court all discretionary power, by the use of language imperative and compulsory. It would require the clearest possible case, where the language used was affirmative only, under the well-settled rules of interpretation of statutes, to justify a Court in holding such language to be imperative; in the terms of Dwarris, just cited, it must be absolute, explicit, peremptory.

In the act now before us, the distinction is clearly taken by the Legislature; no better illustration could be cited, when it says, "and such complaint shall not be valid or regarded by the Court unless the same shall have been filed in the Prothonotary's office within ten days after the election." Here is a clear limitation upon the power of the Court; the language employed leaves no door open for question or doubt. "Shall not be valid or regarded by the Court," has but one signification; negatives the power to take action upon the complaint, by the use of language absolute, explicit, peremptory, unless the condition precedent has been complied with.

In the case of *The People* vs. *Cook*, 14 Barbour 293, the principle is stated thus: Statutes directing a mode of proceeding of public officers are regarded as directory, unless there is something in the statute which shows a different intent. So, also, in *People* vs. *Allen*, 6 Wendell 486. A statute which requires a public officer to perform an official act regarding the rights and duties of others, is directory merely, unless the nature of the act to be performed, or the language used by the Legislature, show that the designation of the time was intended as a limitation of the power of the officer.

Lord MANSFIELD, in *Rex* vs. *Loxdale*, 1 Burr. 447, says: There is a known distinction between things required to be done by act of Parliament and clauses merely directory. In *Rex* vs. *Sparrow*, 2 Strange 1123, the appointment of overseers was held to be valid, though made after the time designated in the act. The statute 54 George III. prescribed the times for holding Courts of Quarter Sessions. It was decided that Quarter Sessions held at other times, were always considered good. So also the statute of 43 Elizabeth directed apprentices to be bound out till twenty-four years of age: a binding under the statute till twenty-one was held to be good.

Under our election laws the ruling has been frequent and uniform in this and other courts, that numerous requirements of the law, enjoining upon election officers the performance of specific acts, when not coupled with a question of fraud, were regarded as directory merely; and not to vitiate the election when omitted to be done; nor the act itself, when imperfectly performed, or performed out of time. The 4th section of our Habeas Corpus Act provides, that if any person committed for treason or felony, shall not be indicted and tried in the *next term* after such commitment, it shall be lawful for the Judges or Justices, and they are thereby required, to set at liberty such persons on bail. The language here used is imperative, "and they are hereby required." Yet it was held in *Commonwealth* vs. *The Jailer, &c.*, 7 Watts 366, that a person laboring under an infectious disease is not entitled of right under this section to be tried at the next term. Other exceptions are recognised in 16 Serg. & R. 305, 2 Wharton 501, and 1 Dallas 9.

The ninth section of the same act imposes upon any Judge or Justice, who, on application, shall refuse or neglect to award a writ of habeas corpus, a penalty of three hundred pounds. The Supreme Court in *Ex parte Laurence*, 5 Binney 304, and in the more recent case of *Passmore Williamson*, 2 Casey 9, construed this section to mean, that Judges were not bound on every complaint of illegal restraint of liberty to allow the writ. These last two instances of the construction which has been given to statutes, are strongly in point; for they are statutes in favor of the liberty of the citizen; in one, the language is that of command, and in the other, a penalty is imposed for a refusal to obey the requirements of the law.

Upon the argument, our own statutes relating to the writs of *quo warranto* and *certiorari* were cited in support of the view taken by the contestant: the same language in substance is used, as in the act under consideration. "Shall be heard and decided at the term to which it is returnable." "And the Court shall at the term, to which the proceedings of the justices of the peace are returnable in pursuance of writs of *certiorari*, determine and decide thereon."

The practical construction given to these acts by this and other Courts, has not limited the power of the Court to the term to which these writs were made returnable. It is, however, but due to the cause to say that no reported case was cited in which the point had been considered and decided. These authorities, to my mind, settle clearly the point that the language employed in the Act of July 2d, 1839, requiring the cause to be decided at the next term, is but directory, and ought to be so regarded, unless there be something in the statute which shows a different intent, and which would therefore require us to give to it a different construction. The first element to be extracted from this or any other statute in our search after its true signification, is to ascertain, if we can, its spirit and intent. The object to be at attained was to enable the Court of Common Pleas to inquire, determine, and judge of an undue election or return, upon the complaint of thirty or more qualified electors. The Court are enjoined in judging concerning said election to *proceed upon the merits*, and to *determine finally* concerning the same, according to the laws of this Commonwealth; then follows the clause upon which the Court differed in opinion, "and the said Court shall hear and determine such contested election at the next term after the election shall have been held."

The design of the law was to secure an investigation of a matter in which citizens generally and the candidate claiming title to the office by election, were deeply interested; questions are involved in such an issue, of the gravest importance, affecting alike the highest principles of honesty and fair dealing between man and man, and the purity of the ballot box, and the vindication of the elective right of the citizens of the Commonwealth; to guard those rights, each of them sacred, and worthy of legislative protection, the Court are enjoined to investigate the merits of the case and finally determine the same according to law; this I hold is the material intent of the Legislature; but inasmuch as they directed that a commission should not issue upon a contest being certified to the Governor, until the Court shall have determined and adjudged on the complaint filed, they directed the Court to hear and determine the same at the next term; but suppose, as in this case, the Court, for

good and sufficient reasons, do not, or cannot hear and determine the complaint within the time designated, What then? Is the law, as to the case already in progress before the proper tribunal, to be regarded as a dead letter? Are the citizens and contestant alike to be turned away, and told that the stroke of the clock has paralyzed the arm of the Court, and that they must go without remedy for an alleged violation of public and private right, because that which was not of the essence of the thing to be done, has not been complied with by the officer of the law, either with or without cause? I think not: I can gather no such meaning from the act, and can regard the command as to time, only in the light of an injunction to the Judges to speed the cause, and at the next term, if possible, fulfil the material requirements of the law, by finally determining the case upon its merits.

Any other view it seems to me reverses the natural order of things; prefers the unimportant to the material; gives to the minor consideration, namely, the time within which a decision is to be rendered, precedence of the more substantial and weighty matters of the law under consideration; for certainly it is far more essential that the Court shall decide the main question, than to allow it to fall dead before the Judges, who were enjoined to decide it finally and upon its merits, by language quite as explicit as that used to indicate the time within which it ought to be determined.

Carpenter's Case seems to have been relied on in support of a contrary view, but that case decides nothing more than that the Supreme Court had no revisatory power by *certiorari* of proceedings under the Act of July 2d, 1839, and that the decision of the Common Pleas was final—all that Judge GIBSON says in that case is by way of argument in support of this proposition, and in my opinion does not apply to the question now before this Court; nor does the point appear to have been even incidentally raised in the Court above; unless the mere citation of the words of the law by the Chief Justice in support of a totally different principle, are capable of such construction and application, which I think they are not.

I am for the reason stated of the opinion that the case of the

contestant is still in Court for determination and final judgment on the merits.

Upon the question as to the proper entry to be made on the record, where the Court is equally divided on the question of jurisdiction, I do not deem it necessary to say more than that the case of *Bingham* vs. *Cabot*, 3 Dallas 19, cited upon the argument by the counsel for the respondent, is to be regarded only as if a motion for a *venire de novo* had been made, which motion fell because the Court were equally divided upon the question as to whether the Court below had jurisdiction of the original cause of action.

LUDLOW, J., dissented.

The case was subsequently determined in favor of the contestant.

I. The foregoing case has never been reported, and as it embodies the judgment of a court having exclusive jurisdiction of the matter in controversy, it is well worthy of preservation. It is also, we believe, the only case in Pennsylvania where the clause of the Act of 2d July 1839, directing certain contested elections to be decided at the next term after they are commenced, has received a judicial construction. In Carpenter's Case, 2 Harris 486, the Supreme Court of Pennsylvania, in an opinion delivered by Chief Justice GIBSON, decided that the determination of the Common Pleas as to the election of a prothonotary or clerk, was, by virtue of the fifth section of the Act of 2d July 1839, *final*, and quashed a writ of certiorari which had issued to remove the proceedings in such a case. Carpenter's Case has never been overruled, though a minority of the judges have since contended for the power to issue a certiorari for the purpose of examining the regularity of the proceedings of the court below, but not to rejudge the merits. Scheetz's Case, cited in note to Br. Purd. 681, ed. 1853; and the still later case of the certiorari to Luzerne Co. in the matter of the contested election of E. B. Collings, determined in March, 1862.

II. The rule of interpretation enunciated by the Common Pleas in this case, is of importance, beyond the point decided in the particular cause. The opinion of the Court defines clearly the rules governing the construction of statutes, and establishes, we think, with much ability, the true distinction between those provisions in a statute, as to time, which are merely directory, and those which are prohibitory. Where acts are directed to be done by public officers, and especially where acts, regarding the rights of the public or of private suitors, are directed to be done by judicial officers, at a certain time, the acts may be done afterwards, even where a penalty is provided for their omission at the proper time. And the cases, generally, have been determined on the very proper ground that it is unjust to deprive the public or private suitors of rights which they have not forfeited by any neglect of their own. Thus in the case of Rex *vs.* Sparrow, 2 Strange 1123, the justices had been guilty of a neglect in not appointing overseers of the poor within due time,

and a mandamus was issued by the King's Bench to compel them to appoint them afterwards *for the sake of the poor.* And Lord MANSFIELD, in Rex *vs.* Loxdale, 1 Burr. 445, said: "*the poor could not have had a specific remedy* in that case, unless the justices might appoint *after* the precise time," and that the act of 43 Eliz. "did not mean that *the poor should lose the equity and benefit of the act,* if the justices did not appoint within that time." The principle of the decision in Stevenson *vs.* Lawrence is the same. The public, who are mainly interested in preventing and overturning frauds at elections, are not to lose their statutory right to a judicial investigation in cases of contested elections, where they have been guilty of no laches. The public can have no control over the time which may be necessary for a proper hearing and determination of a cause by the judiciary, which time may, and, indeed, must vary greatly, according to the circumstances of each particular case, and the pressure of business before the Court. Where, however, an act is to be done by the public, or by any number of citizens on behalf of the public, within a certain time, the same reason does not exist for holding the command of the statute to be but directory, as in the other case, because it may be entirely within the power of the parties to perform the specified act within the time designated, and consequently, if they do not, they are guilty of laches.

III. The recent case of Horton & Heil *vs.* Miller, 2 Wright 270, might seem at first glance to conflict with the foregoing decision in Stevenson *vs.* Lawrence, but an examination of the case will show that it is entirely reconcilable with it, and serves to illustrate the distinction taken between acts to be done by a *court,* and acts to be done by a *party.* The syllabus states broadly that "a court term is a definite and fixed term prescribed by law for the administration of judicial duties, within which the business of the term should be transacted. Terms may be extended to a period of time outside of their proper limits by adjournment, but the *fixed term* is not thereby enlarged." The facts of the case were these. The plaintiff declared on an insolvent bond, executed by defendants, dated June 21st 1858, in the penal sum of $360, upon condition that Horton, one of the defendants, should appear "at the next term of the Court of Common Pleas of Schuylkill county," and then and there present his petition for the benefit of the insolvent laws, &c. The next term was September Term, 1858, which commenced September 6th, and by law was to continue four weeks. The defendant, Horton, did not appear within that time, or present any petition for the benefit of the insolvent laws. The term was adjourned to December 2d, 1858. On November 25th, 1858, suit was brought on the bond, and the Court decided that nothing having been done within the time specified in the bond (which was held to be the four weeks fixed by law for the duration of the term), the condition was held to have been broken, and the plaintiffs' case was sustained. The act of omission, however, was an act to be done by a *party,* the defendant, and of course the direction as to time was held to be imperative. This case, therefore, does not in the least impeach the doctrine of Stevenson *vs.* Lawrence.

M.